Supreme Court, U.S.
FILED
JAN 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1205

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

* *

PHILLIP HOWARD CALVERT,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

* *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* *

BRIEF OF PETITIONER

* *

J. LOUIS WILKINSON
WILKINSON & VINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

QUESTION PRESENTED

Were the Petitioner's Constitutional rights under the Fifth and Fourteenth Amendments violated when the assistant district attorney made an improper comment on the matter of whether or not the Petitioner would testify, and the trial court failed to give curative instruction or grant the Petitioner's motion for a mistrial?

PARTIES

In the Circuit Court of Blount County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Respondent herein, and Phillip Howard Calvert, who is the Petitioner herein.

The matters at issue here were first raised in the Circuit Court of Blount County, Alabama, and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the Petitioner's conviction was without a written opinion.

A copy of the same is submitted in Appendix "A" to this petition.

-The denial of the Petitioner's Application for Rehearing and Rule 39 A.R.A.P. Motion by the Court of Criminal Appeals of Alabama was without a written opinion.

A copy of the same is submitted in Appendix "B" to this petition.

The order of the Alabama Supreme Court denying the Petitioner's writ of certiorari was without written opinion.

A copy of the same is submitted in Appendix "C" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama wherein the writ of certiorari was denied was issued on December 1, 1989, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in Petitioner's writ is the Fifth and Fourteenth Amendments to the Constitution of the United States. A copy of those amendments is submitted as Appendix "D" to this petition.

STATEMENT OF THE CASE AND FACTS

The Petitoner, Phillip Howard Calvert, was indicted for the offense of murder by a Blount County, Alabama, Grand Jury. The issues presented herein for review were first raised at the trial court in Blount County, Alabama. Said issues were presented for review to the Alabama Court of Criminal Appeals, who affirmed the trial court, without opinion, on July 21, 1989. A timely filed Application for Rehearing and Motion under A.R.A.P. Rule 39(k), were both denied without opinion. The same issues were presented to the Alabama Supreme Court by way of a Petition for Writ of Certiorari, and said Petition was denied on December 1, 1989.

ARGUMENT

Perhaps the most fundamental precept of American Jurisprudence is the Fifth Amendment to the United States Constitution which guarantees to a defendant the absolute right to remain silent and not be prejudiced thereby.

As a corollary, any reference by a prosecutor to the matter of the defendant testifying or not testifying or giving testimony is improper and prejudicial and a trial judge should not only sustain an objection thereto, but grant a timely motion for a mistrial where such occurs. The prosecution did just that in his opening statement.

Federal and State of Alabama cases are legion to the effect that the comment of a government attorney in argument to the effort that a defendant has not or will not testify is improper and negatives the right

of silence secured to the accused by the Fifth Amendment to the United States Constitution. Moreover, such conduct necessitates a mistrial or if that be denied then a reversal of any conviction gained as a consequence thereof. See Collins vs. United States, C.A. Kan. 383 F.2d 296 (1961) and Fowler vs. United States, C.A. Fla. 310 F.2d 66 (1962) representation examples of federal case law on this matter.

In the instant case, during his opening statement, the assistant district attorney, Mr. Dobson, stated to the jury, "At the end of the Defendant's testimony, if they have any testimony,...." (emphasis added)

The defendant, Calvert, took an immediate exception to this statement and requested an opportunity to address the court in the absence of the jury. This was denied by the trial judge (R.22). Counsel for Calvert then requested curative instructions to the prosecutor concerning

the unconstitutionally inflammatory statements. The trial court overruled (R.23).

Trial counsel then made a motion for a mistrial based upon the objected to statement of the assistant district attorney making reference to "Defendant's testimony", which was a direct, impermissible reference in opening argument as to whether the defendant would testify or have any testimony. The trial court overruled the motion for a mistrial as well. The trial court failed to give instructions either to the assistant district attorney or the jury on this subject (R.50).

Comments which, if made during the trial or in closing address, would be reversible errors may not be error when they are made in opening address if they are followed by proper limiting instructions by the trial court. United States, Ex Rel Lowery vs. Rundle, D.C. PA, 326 F. Supp. 821

(1971). Or if otherwise cured as in State vs. Hill, 507 P.2d 342, 211 Kan. 287 (1973).

The test for determining whether or not a comment is an attempt to improperly call attention to an accused's right not to testify is whether it is of such a character so that the jury would naturally and necessarily take it to be that kind of comment. See United States vs. Griggs, C.A. Fla. 735 F.2d 1295 (1985).

The reference to "Defendant's testimony" by the assistant district attorney in the case at bar is clearly a violation of the age-old State of Alabama and Federal prohibition against any reference to the matter of whether the defendant testifies in the case. See Alabama cases:

Robinson vs. State, 352 So. 2d 11
Beecher vs. State, 294 Ala. 674, 320 So. 2d 727 (1975)
Padgett vs. State, 45 Ala. App. 56, 223 So. 2d 596
Stain vs. State, 491 So. 2d 816 (Ala. Crim. App. 1986)

Blackmon vs. State, 462 So. 2d 1057 (Ala. Crim. App. 1985)
Pittman vs. State, 462 So. 2d 791 (Ala. Crim. App. 1984)
Wherry vs. State, 402 So. 2d 1130 (Ala. Crim. App. 1981)
Ex Parte Williams 461 So. 2d 852, on remand Williams vs. State, 461 So. 2d 855 (Ala. 1984)
Grady vs. State, 391 So. 2d 1095 (Ala. Crim. App. 1980)

This particular statement said the defendant was going to testify and suggested strongly that he should testify if he was innocent. The required objection, motion for mistrial, and request for appropriate instructions should they be denied were made in a timely and proper fashion. A separate request for instructions to the prosecuting attorney was made and this was overruled as well.

This is a case where through a proscribed statement from a prosecutor which was implicitly approved by the state court, a defendant was effectively "compelled in any criminal case to be a witness against himself".

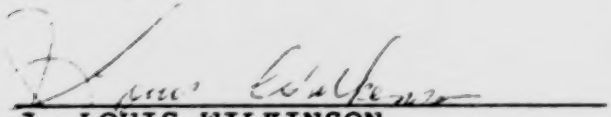
The instant case was a veritable travesty when measured against the safeguards quoted above to which this court and all federal courts have, without exception, adhered to. This would, under the authorities cited, have also included the Alabama Appellate Courts until this case.

We respectfully submit that under the long established rules required by the Constitution and applicable to the subject, the comment was constitutionally prejudiced and the motion for a mistrial should have been granted by the Alabama trial court.

CONCLUSION

The Petitioner submits to this Court that the decision of the Court of Criminal Appeals should be reversed and the case remanded to the trial court.

Respectfully submitted,

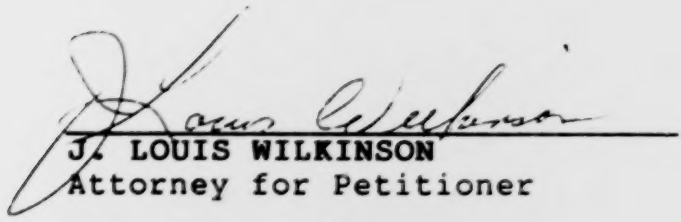


J. LOUIS WILKINSON
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been mailed this date by certified mail to the Honorable Don Siegelman, Attorney General, at his office, 11 South Union, Montgomery, Alabama 36130, properly addressed, first class, postage prepaid.

DATED this the 26 day of January, 1990.



J. LOUIS WILKINSON
Attorney for Petitioner

WILKINSON & VINSON
503 Frank Nelson Building
Birmingham, Alabama 35203
(205) 252-4959

APPENDIX

APPENDIX A

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 693 Blount Circuit Court
CC86-174

Phillip Howard Calvert vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on July 21, 1988 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

XXX **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-1

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 261-4590

6th Div. 693 Blount Circuit Court
CC86-174
Phillip Howard Calvert vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on August 25, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

_____ Notice of Appeal filed. Future correspondence should refer to the above number.

_____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal:_____.
As to briefs, see Rules 28, 31 and 32, A.R.A.P.

_____ On motion, record on appeal accepted and considered as timely filed in this Court.

_____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

_____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

_____ Brief of Appellant filed.

_____ Oral argument requested by appellant.

_____ Reply brief filed.

_____ Oral argument request disallowed; appeal submitted on briefs.

_____ Appeal submitted to the Court for decision in the following manner:

_____ **Affirmed** on appeal. **No Opinion.** Judgment not final, see Rules 40 and 41, A.R.A.P.

_____ Appeal **dismissed. No Opinion.**

_____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

_____ Application for rehearing filed.

_____ Application for rehearing **overruled. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

XXX Application for rehearing **overruled.** Rule 39(k), A.R.A.P., motion **denied. No Opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

_____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

_____ Appeal placed on rehearing **ex mero motu.**

_____ Certificate of final judgment issued to circuit clerk.

_____

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

APPENDIX B-2

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD MCMILLAN
Judges

MOLLIE JORDAN
Clerk
Ph. 242-4590

6 Div. 693 Blount Circuit Court No. CC86-174

Phillip Howard Calvert vs. State of Alabama
Appellant Appellee

Dear Sir:

You are hereby notified that on December 15, 1989, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Motion of appellant seeking indefinite stay is denied. This Court grants 60 day stay from December 1, 1989, conditional upon petition for writ of certiorari being filed in United States Supreme Court within that time. The circuit clerk is hereby directed to return to this Court forthwith the certificate of judgment heretofore issued in this cause.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

Hon. J. Louis Wilkinson
Attorney at Law
503 Frank Nelson Building
Birmingham, AL 35203

Hon. Michael E. Criswell
Clerk, Circuit Court
Blount County Courthouse
Oneonta, AL 35121

APPENDIX C

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

December 1, 1989

88-1593

EX PARTE: PHILLIP HOWARD CALVERT

PETITION FOR WRIT OF CERTIORARI

(Re: Phillip Howard Calvert vs. State)

CCA 6/693

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

HOUSTON, J. - TORBERT, CJ., ALMON and BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.

Witness my hand this 1st day of December, 1989.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

APPENDIX D

a) United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offenses to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

b) United States Constitution - Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.